Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in order to establish the crime-fraud exception to the attorney-client privilege, the government must show only that the client intended his or her communication with the attorney to further an ongoing crime, or whether the government must show as well that the communication itself actually promoted or advanced the crime.

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PETITION FOR A WRIT OF CERTIORARI

The Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 87 F.3d 377 (9th Cir. 1996). App. 1a. By order filed August 7, 1996, the Ninth Circuit denied the Corporation's petition for rehearing and rejected its suggestion for rehearing en banc.

[1] This case involves an ongoing grand jury investigation. The district court and Ninth Circuit files are under seal. To protect the secrecy of the continuing grand jury proceedings, the Ninth Circuit employed pseudonyms for the attorneys, corporation, and corporate employees described in its opinion. App. 2a n.1. We employ the same pseudonyms here.

App. 11a. The district court orders reviewed by the Ninth Circuit are unreported. SA-1 (denying the Corporation's motion to quash grand jury subpoenas); SA-11 (denying the Corporation's motion for reconsideration).[2]

JURISDICTION

The judgment of the Ninth Circuit was entered on June 27, 1996. On August 7, 1996, the Ninth Circuit denied the Corporation's petition for rehearing and rejected its suggestion for rehearing en banc. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

No statutory provisions are involved in this case.

STATEMENT

In the course of investigating whether the Corporation had illegally employed Mrs. T in the early 1990s, the government served grand jury subpoenas on two of the Corporation's former general counsel, Mary Roe and John Doe. The government sought to compel Roe and Doe to testify about communications between themselves and Mrs. C, the Corporation's president.

The Corporation moved to quash the grand jury subpoenas on the ground that the communications were protected by the attorney-client privilege. The government, citing the crime-fraud exception to the privilege, filed a cross-motion to require Roe and Doe to disclose the communications. The district court did not conduct a hearing on the Corporation's motion or the government's cross-motion. Instead, on February 15, 1996, it denied the Corporation's motion and largely granted the government's cross-motion. SA-1. On March 1, 1996, the district court denied the Corporation's motion to reconsider

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[2] "SA" refers to the portions of the appendix filed under seal concurrently with this petition.

its order. SA-11. The Corporation timely appealed to the Ninth Circuit.

The Ninth Circuit affirmed. It acknowledged that, to establish the crime-fraud exception to the attorney-client privilege, the government must show that an attorney's "services were 'utilized . . . in furtherance of [an] ongoing unlawful scheme.'" App. 7a (citing *In re Grand Jury Proceedings (John Doe)*, 867 F.2d 539, 541 (9th Cir. 1989)). However, its decision ignored this rule. Instead of focusing on the client's objective utilization of the attorney's services, the court focused exclusively on the client's subjective intent in seeking the attorney's services. It held that a court can strip all protection from an attorney-client communication on the mere showing that the client sought legal advice while intending to further ongoing criminal activity. App. 7a-8a. Under the Ninth Circuit's formulation, the client's actual utilization of the attorney's services is irrelevant: the attorney can be compelled to disclose the client's confidences even if he or she refused to participate in the client's scheme or gave advice that hindered the client's completion of the crime. App. 8a.

The Ninth Circuit's rule expands the government's ability to intrude into confidential communications between clients and their attorneys. Now, once the government makes the bare showing that a client approached an attorney intending to discuss ongoing criminal activity, the attorney can be forced to disclose the client's communication before a federal grand jury, regardless of the advice given or the resulting decisions made. The government need show nothing beyond the client's intent—even if the attorney's services were not utilized at all to further the ongoing crime.

REASONS FOR GRANTING THE PETITION

1. *Conflict between the circuits.* The Ninth Circuit's decision in this case conflicts with *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995). Under the Ninth Circuit's decision, the government can compel an attorney to reveal a client's confidences to a grand jury on the minimal showing that the client consulted the attorney intending to further an ongoing crime or fraud. In the Second Circuit, however, the government must additionally show that the communication *itself* furthered the crime or fraud—a test that cannot be met unless the government shows that the attorney committed an affirmative act that promoted, advanced, or concealed the client's illegal conduct. Thus, the standard for forcing an attorney to testify to his or her client's confidential communications is much lower in the Ninth Circuit than it is in the Second Circuit. This case, then, provides an opportunity for this Court to instruct all of the federal courts on what showing must be made to find that the crime-fraud exception applies—an issue of crucial importance and national application. *United States v. Zolin*, 842 F.2d 1135, 11.. (9th Cir. 1988) (Beezer, J., dissenting from rejectio.. of suggestion for rehearing en banc), *on later proceedings*, 491 U.S. 554, 109 S. Ct. 2619 (1989). *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 300, 106 S. Ct. 1066, 1072-73 (1986) (certiorari granted because of "the importance of the case, and the divergent approaches of other courts to the issue"); *Comm'r v. Builder*, 369 U.S. 499, 501, 82 S. Ct. 881, 882 (1962) (certiorari granted because of "need for a uniform rule on the point").

2. *Unwarranted intrusion into the attorney-client privilege.* The Ninth Circuit's decision is a danger to all legal practitioners: civil, criminal, or corporate counsel. It greatly expands the reach of the crime-fraud exception to the attorney-client privilege while correspondingly contracting the privilege's protection of privacy and confidences. It places attorneys in the untenable position of

having to warn their clients that, if they discuss the very matters about which they most urgently need counsel, their communications may be revealed to a federal grand jury. This Court should adopt the Second Circuit's formulation, and keep attorneys off the witness stand unless their clients used their services to further a crime—that is, unless the attorneys themselves (whether knowingly or innocently) committed affirmative acts that promoted, advanced, or concealed their clients' ongoing improper schemes.

I. THE NINTH CIRCUIT'S INTERPRETATION OF THE "IN FURTHERANCE" REQUIREMENT CONFLICTS WITH THE SECOND CIRCUIT'S INTERPRETATION OF THAT REQUIREMENT

In *In re Richard Roe, Inc.*, 68 F.3d 38 (2d Cir. 1995), the Second Circuit faced the same issue that the Ninth Circuit faced in this case: how to determine when privileged communications should lose their privileged status under the crime-fraud exception. Generally speaking, the *Roe* court held, "a party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof." 68 F.3d at 40 (citing *In re John Doe, Inc.*, 13 F.3d 633, 637 (2d Cir. 1994)). To establish that the communications were "in furtherance" of the crime or fraud, the court held, the government must make a two-part showing. First, the government must show that there is "probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity." 68 F.3d at 40. Second, "the client communication or attorney work product in question [must] *itself* [be] in furtherance of the crime or fraud." *Id.* (emphasis added). That is, the Second Circuit held that a reviewing court must focus *both* on the client's intent in making the communication *and* on the effect of the communication itself.

The second prong of the test is of crucial importance, because any focus on the effect of the communication must by necessity devolve into an examination of the actions of the attorney, both during the conference and afterwards. It cannot devolve into an examination solely of the client's actions, because the government must already have made a prima facie showing that the client committed a crime or fraud. If the client is already engaged in the crime or fraud, the only way that the client's communication with the attorney can further the unlawful scheme is if the attorney—the only other communicating party—commits an affirmative act that promotes, advances, or conceals the ongoing impropriety. That is, the crime-fraud exception cannot apply unless the attorney advises the client as to how to continue or conceal the scheme, or acts himself or herself to do so. "The communication condemned and unprotected by the attorney-client privilege is advice [by the attorney] that is illicit because it *gives direction* for the commission of future fraud or crime." *Haines v. Liggett Group*, 975 F.2d 81, 90 (3d Cir. 1992) (emphasis added).

The Ninth Circuit's decision in this case is at odds with the Second Circuit's focus on the effect of the client's communication. Under the Ninth Circuit's rule, a district court must assess only the intent of the client before deciding whether to strip a confidential communication of its privileged status. Thus, in the Ninth Circuit, the privacy protecting a confidential communication may be eviscerated even if the attorney gave no advice whatsoever to the client, and did nothing in response to his or her communication. The mere fact that the client intended to further the crime when he or she consulted the attorney is enough to open the communication to the world.

Government prosecutors in the Second Circuit, then, must make a far greater showing than government prosecutors in the Ninth Circuit before they can compel attorneys to give grand jury testimony about their clients'

private communications. If this situation is permitted to continue, the attorney-client privilege will confer far less protection in the nine western states of the Ninth Circuit than it will in the three northeastern states of the Second Circuit. Corporate and other counsel in the Ninth Circuit will be much more vulnerable to grand jury subpoenas, and their clients' private confidences will be correspondingly less protected, than those in the Second Circuit.

Consider the following scenario: an attorney is approached by a client who seeks legal advice to further an unlawful scheme. The attorney hears the client out and then says, "This isn't my area; I'll refer you to someone else." In the Second Circuit, the client's communications would be beyond the reach of government inquiry. In the Ninth Circuit, however, the attorney would be compelled to tell a grand jury everything that the client had said. The Ninth Circuit's opinion thus provides the government with a warrant to intrude into privileged communications without any showing that the communications themselves advanced or promoted ongoing criminal activity. The government need only speculate as to the client's intent for the client's attorney to be forced to testify to the client's private words. The Ninth Circuit's opinion thus stands as a warning to clients and corporations who are uncertain as to whether their conduct is lawful: they consult their attorneys at the peril of seeing their confidences exposed before the grand jury. If the opinion is allowed to stand, such clients will be deprived of counsel at the very time when they most need legal advice.

Only a decision by this Court provides a realistic prospect for resolving this conflict. The Court should grant the Corporation's petition and instruct the lower courts how to decide this important issue.

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS

A. This Court should hold that an attorney cannot "further" an ongoing crime or fraud without committing an affirmative act that advances, promotes, or conceals it

Under the Ninth Circuit's decision, a communication can be stripped of its privileged status on a bare showing that the client harbored a wrongful intent in seeking legal advice. This Court should hold that such a showing, without more, is insufficient to establish that the client's communication with his or her attorney furthered an ongoing criminal scheme. Instead, it should adopt the Second Circuit's test, and hold that the communication must remain privileged unless the government can show that the attorney committed an affirmative act that promoted, advanced, or concealed the scheme.

Such a holding is enforced by the common-sense meaning of "in furtherance." An act "furthers" an ongoing course of conduct when it advances that conduct—when it propels the conduct toward completion. *See United States v. Richard Roe, Inc.*, 68 F.3d at 40 (crime-fraud exception applies where attorney "facilitates or conceals" criminal activity) (citations omitted). Such a holding is also enforced by the plain meaning of "furtherance." *See Black's Law Dictionary* 675 (6th ed. 1990) (defining "furtherance" as requiring "[a]ct of furthering, helping forward, promoting, advancement, or progress").

If a communication cannot further an ongoing crime unless an attorney commits an affirmative act that advances the crime, it follows that an attorney who does nothing to advance the crime should not be compelled to testify to the client's communications. A non-actor simply cannot promote an illegal scheme; to act in furtherance of illegal conduct, the attorney must be an instrument, knowing or unknowing, of the ongoing crime or fraud.

That distinction is illustrated in *United States v. Dyer*, 722 F.2d 174 (5th Cir. 1983). There, the defendant,

after seeking and receiving a $25,000 bribe, returned the money with a letter that presented what the court characterized as a "phony explanation" for the money's return. *Id.* at 175-76, 177. Yet the government was not permitted to discover the defendant's communications with his attorney regarding the letter, even though the defendant had consulted the attorney on the day before the letter was written. The record did not show that the attorney had had anything to do with the composition of the letter. That is, as to the letter, the attorney had been a non-actor. The communications thus retained their protected status. *Id.* at 177.[3] However, the defendant's communications with a second attorney regarding the letter could be exposed, because the second attorney had actually written the letter, and because the defendant had consulted the second attorney for the express purpose of creating false evidence and, in this way, obstructing justice. *Id.* at 176-77. The second attorney, then, had committed an affirmative act in writing the deceptive letter after consulting with his client, and his affirmative act had furthered the client's obstruction of justice. Evisceration of the attorney-client privilege was therefore warranted. *Id.* at 177.

The decisions of other courts have also comported with the proposition that an attorney must commit an affirmative act in order for his or her client's communications to be stripped of their protection. In *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985), for example, the court found that a corporation's attorneys had been the instrumentalities of an ongoing fraud upon the court. The attorneys had submitted a fraudulent inventory of vital documents to the court and had falsely stated in an affidavit that neither they nor their clients had concealed or misrepresented information regarding subpoenaed material. *Id.* at 400-02. The attorneys had taken affirmative steps,

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[3] The court also ruled that, even if the attorney had advised the defendant concerning the situation, the advice "could have [been] sound and legal." *Dyer*, 722 F.2d at 177.

whether innocently or knowingly, that had assisted the corporation in perpetrating a fraud. Attorney-client communications as to the misrepresentations were therefore discoverable, because the attorneys' representations and advice had helped the corporation to carry out its fraudulent scheme. *Id.*

In contrast, in *In re In-Store Advertising Securities Litigation*, 163 F.R.D. 452 (S.D.N.Y. 1995), a corporation's attorneys took no affirmative steps to advance or conceal the corporation's alleged fraud. *Id.* They allegedly knew of the alleged wrongdoing, but neither their work product nor their client's communications with them furthered the wrongdoing. The court held that, under these facts, neither the work product nor the confidential communications could be disclosed. *Id.; see also United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (communications retain privileged status because, although attorney-client communication was related to client's criminal activity, it did nothing to further it); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 203-04 (5th Cir. 1981) (attorney's act in forming offshore corporation ruled unrelated to smuggling of marijuana even though title of boat used for smuggling registered in name of corporation shortly after its formation); *Ventre v. Datronic Rental Corp.*, 1995 U.S. Dist. LEXIS 1199 (N.D. Ill. 1995) (communication between attorney and client, without more, while client engaged in criminal or fraudulent activity, insufficient to vitiate attorney-client privilege). Had any of these cases been decided under the Ninth Circuit's rule in this case, all of the protected communications at issue, like the communication protected in *Dyer*, would have been exposed.

B. The Ninth Circuit's decision puts all clients and all counsel at risk

Before the Ninth Circuit issued its opinion in this case, a client in that circuit could seek advice as to whether his or her conduct violated the law, and, if so, what

course of action to follow—and could do so secure in the belief that his or her confidences would remain inviolate. The protection afforded to the client's confidences was invaluable: it enabled the client to seek advice in confidence, and it enabled the attorney to evaluate the client's conduct and advise the client appropriately. It is precisely this free exchange of information between lawyer and client that allowed the attorney-client relationship to come into existence. Only the protection given to the client's confidences and the attorney's advice permitted the client to seek guidance and the attorney to offer it. The rule that governed the scope of the crime-fraud exception at that time was best expressed in *In re Grand Jury Proceedings (John Doe)*, 867 F.2d at 541, which held that the exception requires the government to establish reasonable cause to believe that the attorney's services were "utilized . . . in furtherance of the ongoing unlawful scheme."

In its decision in this case, the Ninth Circuit noted the important policy reasons behind this requirement, App. 6a-7a, but then allowed the crime-fraud exception to swallow the rule that attorney-client communications must be protected. Under the new regime established by the Ninth Circuit's opinion, any attorney consulted by a client who is engaged in improper activity may be forced to disclose the client's confidences to a federal grand jury—even if the attorney refused to advise the client at all, or urged the client to cease the unlawful activity, or hindered the client's further improprieties. App. 8a. Under these circumstances, attorneys will be compelled to warn their clients of the consequences of their communications before the communications are made, freezing the communications at their inception. Clients will hesitate to provide their attorneys with exactly the information that their attorneys need to assess their conduct. Even clients who do not know whether their conduct violates the law will be unable to consult their attorneys in confidence to find the answer. If the government can now compel the dis-

closure of a client's confidences in so broad a range of situations, how is a client fully and frankly to disclose his or her activities to an attorney? How is a corporate client to solicit an attorney's advice to determine whether the corporation is violating the law?

The opinion raises red flags not just for clients but for attorneys as well. An attorney must now advise a client who may be involved in improper conduct not to disclose information to him or her that the client does not wish the grand jury to learn. How is an attorney, consistent with this ethical duty, to ask a client to provide all of the facts relevant to the client's situation? How can any attorney now give such a client meaningful legal advice without discouraging the client from speaking frankly?

Such a result is contrary to "the whole point" of the attorney-client privilege. *United States v. Eirven*, 987 F.2d 634, 636 (9th Cir. 1993) (Kozinski, J.) ("whole point" of privilege is to enable defendant "to feel free to explore all possible options with his attorney") (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981)); *see also Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 913 (1980) (privilege rests on attorney's need to be fully informed by client). "A defendant who knows that saying something impermissible to his lawyer can mean extra years in prison—and who knows how little he knows about what exactly is permissible—may well become afraid to say anything, and may therefore not take full advantage of his Sixth Amendment right to effective legal assistance." *Eirven*, 987 F.2d at 636. With its opinion in this case, the Ninth Circuit has hobbled the sixth amendment rights not only of criminal defendants but of corporate executives, owners of small businesses, and even ordinary citizens who have questions about their taxes. The opinion thus permits the exception to swallow the rule, inviting the government to listen in on a broad range of attorney-client communications and frustrating the very purpose of the rule.

III. IN THIS CASE, NO COMMUNICATION BETWEEN ROE OR DOE AND THE CORPORATION FURTHERED ANY ALLEGED CRIMINAL ACTIVITY

In its opinion, the Ninth Circuit assumed that neither Roe nor Doe committed any affirmative act that actually furthered a crime. App. 8a n.6. Based only on the alleged wrongful intent of Mrs. C, the Corporation's president, at the time that she allegedly consulted Roe and Doe, the court ordered the two attorneys to reveal Mrs. C's communications to the grand jury.

This Court should hold that Mrs. C's intent alone is not enough to force either attorney to testify to his or her communications with Mrs. C concerning the alleged crimes (assuming that such communications ever took place). Because the attorneys' communications with Mrs. C. neither involved nor were followed by an affirmative act on the part of either attorney that advanced, promoted, or concealed the alleged crimes, the communications should remain inviolate.

CONCLUSION

For the foregoing reasons, the Corporation's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 96-55344

In re GRAND JURY PROCEEDINGS

Argued and Submitted June 4, 1996
Decided June 27, 1996

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding—
D.C. No. MISC. 36890

Before: BRUNETTI and RYMER, Circuit Judges, TANNER,* Senior District Judge.

RLMER, Circuit Judge:

We must decide whether communications between an attorney and client can be "in furtherance of" criminal activity, as they must be to fall within the crime-fraud exception to the attorney-client privilege, even if the attorney is unaware of the crimes and takes no affirmative step that actually furthers them.

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* Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

Corporation appeals the district court's order requiring its two former corporate counsel, Mary Roe and John Doe, to appear before a federal grand jury to answer questions about confidential communications they had with corporate personnel regarding the employment status and form of compensation of an employee of Corporation.[1] The district court found that the communications were in furtherance of and related to the targets' ongoing immigration and tax crimes and were therefore within the crime-fraud exception to the attorney-client privilege.

We hold that otherwise privileged communications can be "in furtherance of" criminal activity, and therefore within the crime-fraud exception, even though the attorney is unaware of the crime and takes no affirmative step that actually furthers it. As we agree with the district court that the government made a *prima facie* showing that the crime-fraud exception applies here, and as we have jurisdiction under 28 U.S.C. § 1291 of an order compelling an attorney to testify before a grand jury about matters claimed to be privileged, *In re Grand Jury Subpoena, 92-1(SJ)*, 31 F.3d 826, 829 (9th Cir.1994), we affirm.

I

Corporation, its president ("Mrs. C"), and two employees ("Mr. and Mrs. T"), are the targets of a federal grand jury investigation into immigration and tax crimes. According to the government, Mr. and Mrs. T are under investigation for federal tax evasion and Corporation and Mrs. C are under investigation for conspiracy to commit tax evasion and to impair and impede the lawful functioning of the Immigration and Naturalization Service by will-

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[1] All documents and briefs in this matter have been filed under seal to protect the secrecy of the ongoing grand jury proceedings. The true names of the appellant corporation, its two former in-house attorneys, and its other relevant personnel are not revealed in this opinion. *See In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 826 n. 1 (9th Cir.1994).

fully employing Mrs. T in the United States when they knew that she lacked the necessary visas or work permits.

In connection with this investigation, the government served grand jury subpoenas on Roe and Doe. Corporation moved to quash the subpoenas, invoking the attorney-client privilege and the attorney work-product doctrine. The government opposed the motion to quash and filed its own motion to compel, arguing that the testimony sought from the lawyers fell within the crime-fraud exception. In support, the government submitted material which the district court reviewed *in camera*.

The district court denied Corporation's motion to quash and granted the government's motion to compel in large part. Assuming that the communications were privileged,[2] the court found that "[t]he government has established a prima facie case that the legal advice of [Doe] and [Roe] was sought in furtherance of, and was sufficiently related to, ongoing immigration and tax crimes. Accordingly, the crime-fraud exception to attorney-client privilege applies." The court also concluded that the crime-fraud exception applied to the *fact* work product of Roe and Doe but not to their *opinion* work product because the government had not made a *prima facie* showing that Roe or Doe knew that Mrs. T was working for and receiving paychecks from Corporation during the time they assisted it in obtaining her work authorization.[3] For these reasons, the

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[2] As the government argues, assuming that all the communications within its request were privileged was generous, as what the attorneys communicated to the INS or observed about Mrs. T may not in fact be protected. But it makes no difference in this case which issue the district court reached first, as the district court no doubt figured when it decided to assume that the privilege applies and to cut to the chase directly. Going first to the crime-fraud exception may not always be the most prudent course, however, as to do so runs the risk of expositing (and thereby expanding) that exception unnecessarily.

[3] This part of the court's order, pertaining to opinion work product, which it said "is comprised of the attorney's mental impres-

court ordered testimony by Roe and Doe having to do with (1) identification of documents they prepared or furnished to the INS in connection with obtaining work authorization for Mrs. T while she was employed by Corporation and conversations with United States government personnel about Mrs. T's immigration status; (2) communications among or between Roe or Doe, Mrs. C, Mrs. T, and other personnel or Corporation regarding Mrs. T's immigration status and attempts to obtain INS work authorization for her; and (3) communications among the same persons regarding how Corporation compensated Mrs. T during the time she was not authorized to work in the United States. Corporation timely appeals.

II

Whether we review a district court's conclusion that the government has made a *prima facie* showing that communications were made in furtherance of a crime *de novo* or for an abuse of discretion appears to be an open question in this circuit. *United States v. Laurins*, 857 F.2d 529, 541 (9th Cir.1988), *cert. denied*, 492 U.S. 906, 109 S.Ct. 3215, 106 L.Ed.2d 565 (1989). We need not resolve it, however, because under either standard, we conclude that the government has met its burden.

III

The parties do not dispute the applicable rule: To invoke the crime-fraud exception successfully, the government "has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality . . . and that there is some relationship between the communications and the illegality." *Laurins*, 857 F.2d at 540 (citations omitted).[4]

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sions, opinions, judgments, and legal theories," is not before us on this appeal.

[4] *In re Sealed Case*, 754 F.2d 395 (D.C.Cir.1985), from which we derived the rule in *Laurins*, set out a two-step inquiry: the party

Corporation, however, contends that the government did not show that the communications were made "in furtherance of" the Corporation's ongoing or intended immigration or tax crimes for a number of reasons: It can't be that there is no attorney-client privilege whenever an attorney assists a client in legalizing an employee's employment status if at the time the appropriate application is submitted to the INS the employee is allegedly illegally employed; the government didn't show that there was any communication which was in itself in furtherance of any crime (that is, there is no showing that either lawyer made any false representation to the INS in connection with the submission of Mrs. T's application); Roe and Doe were not aware of Mrs. T's employment arrangement and did not take an affirmative step that in fact facilitated commission of the crimes; and as neither knew about her status, the government failed to show that any communication was in furtherance of a tax or immigration offense. Corporation also suggests that the district court substituted "relevance" for "in furtherance," thereby incorrectly concluding that testimony by Roe and Doe should be compelled just because it is relevant to, instead of because it was "in furtherance of," criminal activity.

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who seeks to invade the privilege "must first make a prima facie showing of a violation sufficiently serious to defeat the privilege, and second, establish some relationship between the communication at issue and the prima facie violation." *Id.* at 399 (footnote omitted). Other circuits have articulated a similar two-part test. In *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223 (11th Cir. 1987), for example, the Eleventh Circuit held that "[f]irst, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benfit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it." *Id.* at 1226. *See also In re Int'l Systems and Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir.1982); *In re Murphy*, 560 F.2d 326, 338 (8th Cir.1977).

Because all of Corporation's points have to do with the *attorney*'s knowledge, state of mind or actions, we disagree that the district court erred since it focused, quite properly, on the *client*.

A

The protection afforded by the attorney-client privilege does not extend to any communication "in furtherance of intended, or present, continuing illegality." *United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir.1977) (citations omitted). While there is a societal interest in enabling clients to obtain complete and accurate legal advice, which we serve by sheltering confidential communications between client and attorney from public consumption, there is no such interest when the client consults the attorney to further the commission of a crime or fraud. *In re Grand Jury Proceedings (John Doe)*, 867 F.2d 539, 541 (9th Cir.1989). Thus the crime-fraud exception insures that the confidentiality enveloping the attorney-client relationship does not encompass communications "made for the purpose of getting advice for the commission of a fraud or crime," *United States v. Zolin*, 491 U.S. 554, 563, 109 S.Ct. 2619, 2627, 105 L.Ed.2d 469 (1989) (internal quotation and citation omitted), but the exception does not sweep so broadly that it discourages clients from "mak[ing] full disclosure to their attorneys of *past* wrongdoings, in order that the client may obtain the aid of persons having knowledge of the law and skilled in its practice." *Id.* at 562, 109 S.Ct. at 2626 (internal quotations and citations omitted) (emphasis added).

To trigger the crime-fraud exception, the government must establish that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *In re Sealed Case*, 754 F.2d at 399 (citations omitted). The government is not obliged to come forward with proof sufficient to establish

the essential elements of a crime or fraud beyond a reasonable doubt, *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir.), *cert. denied*, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971), since the crime-fraud exception does not require a *completed* crime or fraud but only that the client have consulted the attorney in an *effort* to complete one. *In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co. A.G.)*, 731 F.2d 1032, 1039 (2d Cir. 1984). On the other hand, it isn't enough for the government merely to allege that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney. A threshold that low could discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas. Rather, the district court must find "reasonable cause to believe" that the attorney's services were "utilized . . . in furtherance of the ongoing unlawful scheme." *In re Grand Jury Proceedings*, 867 F.2d at 541.

As we have previously said, for the crime-fraud exception to apply, "the attorney need not himself be aware of the illegality involved; it is enough that the communication furthered, or was intended by the client to further, that illegality." *Friedman*, 445 F.2d at 1086; *see also Hodge & Zweig*, 548 F.2d at 1354 ("The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought in furtherance of such an improper purpose."). Inasmuch as today's attorney-client privilege exists for the benefit of the client, not the attorney,[5] it is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need know nothing about the client's ongoing or planned illicit activity for the ex-

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[5] The original justification for the privilege was to preserve the "honor" of the attorney as a professional gentleman. *See* 8 J. Wigmore, *Evidence in Trials at Common Law*, § 2290 at 543 (McNaughton rev. ed.1961). Later, to survive the onslaught that befell the other privileges founded on that rationale, the privilege reinvented itself as existing for the benefit of the client. *Id.*

ception to apply. It is therefore irrelevant, for purposes of determining whether the communications here were made "in furtherance of" Corporation's criminal activity, that Roe and Doe may have been in the dark about the details of that activity.

Corporation's argument that communications with Roe and Doe could not have been "in furtherance of" criminal activity because neither attorney took an *affirmative* step that *actually* furthered the crimes[6] fares no better. The crime-fraud exception does not require that the attorney have participated, even unwittingly, in the client's criminal activity. A communication between client and attorney can be "in furtherance of" the client's criminal conduct even if the attorney does nothing after the communication to assist the client's commission of a crime, and even though the communication turns out not to help (and perhaps even to hinder) the client's completion of a crime. Moreover, inasmuch as the government need not establish, for purposes of the crime-fraud exception, that the crimes succeeded, *see In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co. A.G.)*, 731 F.2d at 1039 ("[i]f a fraudulent plan were ineffective, the client's communications would not thereby be protected from disclosure"), the government is not required to prove that the communications with Roe or Doe *in fact* helped the targets commit the crimes.

Finally, Corporation relies on the Second Circuit's decision in *In re Richard Roe, Inc.*, 68 F.3d 38 (2d Cir. 1995), which held that communications do not come within the crime-fraud exception merely because they are relevant to the client's alleged criminal or fraudulent activity, *id.* at 40, to argue that the district court incorrectly applied a "relevance" test. We don't read the court's order

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[6] Although we assume for purposes of our analysis that neither Roe nor Doe committed an affirmative act, it is not entirely clear that this is so, given that Roe *affirmatively* sent letters to the INS that didn't disclose the full extent of what the Corporation knew about the existing illegal employment of Mrs. T.

this way, however. Based on its in camera review of the government's evidence, the court first found reasonable cause to believe that communications between counsel and the targets were in furtherance of and closely related to the alleged immigration crimes; then it found reason to believe that any priviliged communications dealing with Mrs. T's immigration status are relevant to whether she was an employee of Corporation, and thus are also relevant to the allegations of tax evasion based on her receipt of funds from Corporation; and then it concluded that the government established a prima facie case that the legal advice of Roe and Doe was sought in furtherance of and was sufficiently related to ongoing immigration and tax crimes. By this analysis the court simply tied communications about Mrs. T's employment status to both immigration problems and tax problems; it did not substitute "relevance" for "in furtherance" but explicitly acknowledged, and applied, our requirement that the crime-fraud exception applies only to communications "in furtherance of intended, or present, continuing illegality." *Hodge & Zweig*, 548 F.2d at 1355.

B

We have examined the in camera submission, and we agree with the district court that the government has made a *prima facie* case for application of the crime-fraud exception to the matters the court ordered disclosed. The evidence shows that the corporate targets consulted counsel about Mrs. T's employment status shortly after another employee told Mrs. C of the likely illegality of the existing situation. Corporation did not stop its alleged criminal conduct with regard to Mrs. T, but continued to employ her illegally. When Corporation, through Roe, corresponded with the INS in September and October of 1991 about its petition to legalize Mrs. T's employment, it did not disclose that Mrs. T already had been working in Corporation's U.S. office illegally for more than a year.

We further agree that since the in camera evidence gives rise to reasonable cause to believe that communica-

tions between counsel and the targets were in furtherance of and sufficiently related to the crimes under investigation, ordering the appearance of Roe and Doe before the grand jury and their testimony on the areas within the scope of the court's order was proper, whether or not the attorneys knew they were being so used or were in fact so used.

AFFIRMED.

APPENDIX B

[Filed Aug. 7, 1996]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-55344
D.C. No. Misc. 30890

In re: GRAND JURY PROCEEDINGS

APPEAL OF THE CORPORATION

ORDER

Before: BRUNETTI and RYMER, Circuit Judges, TANNER,* Senior District Judge.

The panel has voted to deny the petition for rehearing. Judges Brunetti and Rymer vote to reject the suggestion for rehearing en banc and Judge Tanner so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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* Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.